

SERVICE DATE – OCTOBER 23, 2014

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 603 (Sub-No. 3X)

V AND S RAILWAY, LLC—ABANDONMENT EXEMPTION—
IN KIOWA COUNTY, COLO.

Decided: October 21, 2014

Digest:¹ The Board denies an appeal of a decision issued by the Director of the Office of Proceedings rejecting V and S Railway, LLC’s verified notice of exemption.

On June 17, 2014, the Board, by decision of the Director of the Office of Proceedings (the Director), rejected a verified notice of exemption filed by V and S Railway, LLC (V&S) under 49 C.F.R. § 1152.50 to abandon a line of railroad between milepost 749.5 near Towner and milepost 787.5 near Eads (the “Eastern Segment”), a distance of approximately 38 miles, in Kiowa County, Colo. The Eastern Segment is part of the “Towner Line,” which extends approximately 121.9 miles between milepost 747.5 near Towner and milepost 869.4 near NA Junction, in Colorado. On June 20, 2014, V&S filed an appeal of that decision. As discussed below, we are denying the appeal.

BACKGROUND

In 2005, V&S obtained Board authorization to assume an existing lease of the Towner Line from the previous lessee. V&S Ry.—Acquis. & Operation Exemption—Rail Line of Colo., Kan. & Pac. Ry., FD 34779 (STB served Dec. 30, 2005). Later, V&S obtained authority to discontinue operations over the western portion of the Towner Line between NA Junction, at milepost 868.5, and Haswell, at milepost 808.3 (the “Western Segment”). V&S Ry.—Discontinuance of Serv. Exemption—in Pueblo, Crowley, & Kiowa Cntys., Colo., AB 603 (Sub-No. 2X) (STB served June 28, 2012).

When V&S assumed the lease of the Line in 2005, it also purchased the Line from its previous owner but did not obtain the authority to do so. In 2012, V&S belatedly sought and obtained Board authority for that purchase. See V&S Ry.—Acquis. & Operation Exemption—Colo. Dep’t of Transp. (V&S Acquisition), FD 35664 (STB served Nov. 13, 2012). There, V&S stated that it “expect[ed] in the near future to file with the Board its Verified Notice of

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

Abandonment Exemption to abandon the [W]estern [S]egment of the Towner Line, between NA Junction and Haswell” (for which it had already obtained discontinuance authority) and asked that its requested acquisition authority be made retroactive to the consummation date of its lease in 2005.² The Board declined to make V&S’s authority retroactive but stated that it would allow V&S to use the Board’s class exemption procedures at 49 C.F.R. pt. 1152 subpart F to abandon the Western Segment by waiving the usual requirement for an abandoning carrier to have had Board-authorized ownership of the line for at least two years. V&S Acquisition, slip op. at 5. Thus, the Board ordered that “[w]ith respect to V&S’s future request to seek authority to abandon the [W]estern [S]egment of the Towner Line, application of the Board’s regulation at 49 C.F.R. § 1152.50(b) is waived to the extent it requires V&S to have had *Board-authorized ownership* of the line for at least two years in order to make the certification required under that provision.” Id. (emphasis added).

To date, V&S has not filed for authority to abandon the Western Segment. However, on May 14, 2014, V&S filed a verified notice of exemption in this docket to abandon the Eastern Segment. In its notice, V&S included the class exemption certification required under 49 C.F.R. § 1152.50(b) regarding the lack of local traffic over the line for at least two years, the rerouting of any overhead traffic, and the absence of formal complaints within the two-year period. V&S did not request a waiver of the requirement to have had Board-authorized ownership for two years but instead asserted that, in V&S Acquisition, the Board had “waived the requirement that V&S have Board authorized ownership of the Towner Line for at least two years.”³

On June 17, 2014, the Board, by decision of the Director, rejected the notice. That decision explained that the informal, streamlined class exemption process is typically reserved for routine transactions that are uncomplicated and noncontroversial, and it noted various concerns about V&S’s notice of exemption that made use of the class exemption inappropriate. The decision explained that V&S did not have a waiver of the two-year ownership requirement for the Eastern Segment and therefore was disqualified from using the class exemption. It also noted that the notice of exemption did not address how V&S would continue to meet its common carrier obligation on other portions of the Towner Line and that a commenter had raised questions regarding the existence of federally granted rights-of-way on the Eastern Segment. On June 20, 2014, V&S appealed.⁴

² V&S’s Pet. 8-9, V&S Acquisition, FD 35664 (filed Aug. 15, 2012).

³ V&S’s Notice of Exemption 2 n.1.

⁴ On October 9, 2014, Colorado State Senator Larry Crowder filed a letter in this docket expressing concern that V&S has been removing track from the Towner Line from Arlington, Colo., westward. That track is on the Western Segment, for which V&S obtained discontinuance authority in 2012. V&S Ry.—Discontinuance of Serv. Exemption—in Pueblo, Crowley, & Kiowa Cnty., Colo., AB 603 (Sub-No. 2X) (STB served June 28, 2012). Because Senator Crowder’s concern pertains to the Western Segment of the Towner Line, not the Eastern Segment that is at issue in this abandonment proceeding, we will not address it here; however, the staff of the Board’s Rail Customer and Public Assistance Program is available to discuss this matter informally.

DISCUSSION AND CONCLUSIONS

Under 49 C.F.R. § 1011.7(a)(2)(x), the Board has delegated to the Director the authority initially to determine whether to issue notices of exemption under 49 U.S.C. § 10502. The Board has reserved for itself the consideration and disposition of all appeals of initial decisions issued by the Director under § 1011.7. 49 C.F.R. § 1011.2(a)(7).⁵ Here, V&S argues that the Director should not have rejected its notice of exemption. Thus, on appeal, the Board considers whether the notice of exemption was properly rejected.

V&S has only had Board-authorized ownership of the Towner Line since December 2012, when its acquisition exemption became effective. Accordingly, the Director's order held that V&S could not use the two-year out-of-service class exemption set forth in 49 C.F.R. § 1152.50(b) for the Eastern Segment of the line. V&S contends that its appeal of the Director's order should be granted because nothing in the language of 49 C.F.R. § 1152.50(b) restricts use of the class exemption to the owner of the railroad line. According to V&S, "[i]t is not the ownership of the railroad line that is determinative, but rather it is the length of time that a Board sanctioned railroad line has not been operated which is significant"⁶ This statement is contrary to agency precedent. In Tulare Valley Railroad Company—Abandonment Exemption—in Kings & Tulare Counties, Cal. (Tulare), 9 I.C.C. 2d 1205 (1993), the Interstate Commerce Commission (ICC) concluded that the class exemption process was inapplicable because of the ownership history of the rail line, even though the line at issue had been out of service for two years. There, the ICC held that a carrier-owner could not tack onto the previous owner's certification of no local traffic to meet the two-year out-of-service requirement. See also BNSF Ry.—Aban. Exemption—in Okla. Cnty., Okla., AB 6 (Sub-No. 430X), slip op. at 5 (STB served Jan. 26, 2007) (finding use of the class exemption inappropriate despite two years of inactivity because the acquisition of rights over a portion of the line by a lessee during that period provided a perception of a demand for service). Moreover, in the decision granting V&S authority to acquire the Towner Line, the Board specifically described the requirement as being one of "*Board-authorized* ownership of the line for at least two years." V&S Acquisition, slip op. at 5 (emphasis added).⁷

⁵ V&S cites 49 C.F.R. § 1011.6(b), which applies to decisions of Board employees acting under authority delegated under that section rather than § 1011.7. Even if § 1011.6(b) applied here, we would deny V&S's appeal for failure to meet the standards of that section.

⁶ V&S's Appeal 2.

⁷ Indeed, V&S itself appears to acknowledge the importance of ownership to the class exemption for abandonments at § 1152.50 in its filings. In its notice, V&S stated that "[t]he Board's [V&S Acquisition] Decision waived the requirement that V&S have *Board authorized ownership* of the Towner Line for at least two years before making the certification required at 49 C.F.R. § 1152.50(b)." V&S's Notice of Exemption 2 n.1 (emphasis added). Later, in its appeal, V&S concedes that the "requirement that a rail carrier have owned the line for the two years preceding its filing of a notice of abandonment exemption under the two-year out-of-service class exemption of 49 C.F.R. § 1152.50(b) . . . stems from [the] ICC's Decision in [Tulare]." V&S's Appeal 5.

V&S argues that the situation here is distinguishable from Tulare because V&S has owned and operated the Towner Line (albeit without the needed Board authority) for more than two years. But V&S's attempt to rely on its unlawful ownership of the Towner Line to support its eligibility for the two-year out-of-service class exemption fails because the agency has described the prerequisite for invoking the class exemption as being "*Board-authorized* ownership of the line for at least two years." V&S Acquisition, slip op. at 5 (emphasis added). A Board holding that the two-year out-of-service certification may be filed by a carrier that unlawfully owned and operated a line for all or part of the two-year period would reward the carrier's inattention to (or deliberate evasion of) its legal obligations. Accordingly, in circumstances such as this, the appropriate procedure is for the carrier to file a petition for exemption, see Pet. for Exemption, Ga. Dep't of Transp.—Aban. Exemption—in Fulton Cnty., Ga., AB 1096X (filed Mar. 15, 2012) (carrier filed petition for exemption rather than notice of exemption due to Tulare), or, as the Board permitted for the Western Segment, seek a waiver of the ownership requirement.

Finally, V&S appears to challenge the Board's determination in V&S Acquisition, stating that the Board "for some inexplicable reason limited its ruling to 'the [W]estern [S]egment of the Towner Line.'" ⁸ However, in its petition in that proceeding, it was V&S that stated that it intended to abandon the Western Segment in the near future; no mention was made of the Eastern Segment. The waiver was limited to the Western Segment for that reason. To the extent that V&S disagrees with this limitation, it should have raised this concern in 2012 when the V&S Acquisition decision was issued. As it stands, the Board granted a waiver of the two-year ownership requirement to V&S for the Western Segment only. ⁹ V&S has not requested a waiver for any other portion of the Towner Line.

Consequently, for the reasons discussed above, we will deny V&S's appeal of the Director's decision rejecting its notice of exemption. ¹⁰

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

⁸ V&S's Appeal 4.

⁹ Although there is no indication that its statement was intentionally misleading, we note that, despite V&S's acknowledgment on appeal that V&S Acquisition limited the waiver to the Western Segment, V&S stated in its verified notice of exemption (at 2 n.1) that the waiver covered "the Towner Line."

¹⁰ Although the decision rejecting the notice of exemption identified a number of other concerns, to which V&S briefly responds in its appeal, it is not necessary to address those concerns here because the absence of a waiver is sufficient to disqualify V&S from using the two-year out-of-service class exemption and thus to deny the appeal.

It is ordered:

1. V&S's appeal of the Director's decision is denied.
2. This decision is effective on the date of service.

By the Board, Chairman Elliott, Vice Chairman Miller, and Commissioner Begeman.